

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

75-1237

To be argued by
DOMINIC F. AMOROSA

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 75-1237

UNITED STATES OF AMERICA,
Appellee,
—v.—
ERIC BLITZ, PETER HORVAT, RICHARD ORPHEUS
and WILLIAM DREW,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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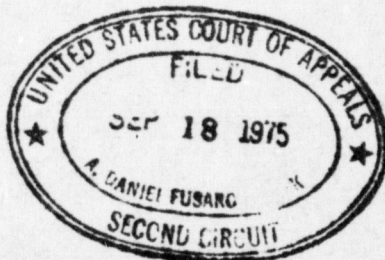


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Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Eric Blitz, Peter Horvat, Richard Orpheus and William Drew appeal from judgments of conviction entered against Blitz on June 6, 1975, against Horvat on June 16, 1975, and against Orpheus and Drew on May 23, 1975, in the United States District Court for the Southern District of New York, after a five-week trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment S74 Cr. 1226, filed on December 31, 1974, which superseded Indictment 74 Cr. 798, charged fifteen defendants with conspiracy and substantive violations of the federal securities laws, mail fraud and perjury. Count One charged all appellants and George Van Aken, Steven Hill, William McLeod, Erwin Gerstenzang, Barry

Ross, Frank Kadison, John J. Santiago, a/k/a Sonny Santini, Robin Baron, Robert Turco, a/k/a Frank Bruno, Peter Rosenthal and Robert Rosan, with conspiracy to violate the federal securities laws and to commit mail fraud in connection with the offer, sale and trading of the common stock Elinvest, Inc. Title 18, United States Code, Section 371. Counts Two through Six charged all defendants, with the exception of Hill, with fraud in the offer and sale of securities. Title 15, United States Code, Sections 77(q)(a) and 77x and Title 18, United States Code, Section 2. Counts Seven through Thirteen charged all defendants, with the exception of Hill, with fraud in connection with the purchase and sale of securities. Title 15, United States Code, Sections 78j(b) and 78(ff); Title 17, Code of Federal Regulations, Section 240.10b-5; and Title 18, United States Code, Section 2. Counts Fourteen through Eighteen charged all defendants, with the exception of Hill, with mail fraud. Title 18, United States Code, Sections 1341 and 2. Count Nineteen charged Blitz with accepting outside compensation as a person affiliated with the Astron Fund, a registered investment company, in connection with its purchase of Elinvest, Inc., stock. Title 15, United States Code, Sections 80a-17(e)(1) and 80a-48. Count Twenty charged Ross, Kadison and Turco with a violation of Title 18, United States Code, Sections 1952 and 2. Count Twenty-One charged Horvat with perjury. Title 18, United States Code, Section 1623. Counts Twenty-Two through Twenty-Five charged Ross with perjury. Title 18, United States Code, Section 1623.

Prior to trial defendants Van Aken, Hill, Santini Gerstenzang, Rosenthal, McLeod and Ross pleaded guilty to Count One and Robin Baron pleaded guilty to Count Two. Defendants Turco and Kadison were severed as was Count Twenty-One charging Horvat with perjury.

Trial commenced before Judge Bonsal on January 27, 1975 against appellants and Robert Rosan. At the close of the evidence, Count One was dismissed as against the appellant Blitz and Counts Two through Six were dismissed as against all appellants. On March 3, 1975, the jury found Blitz guilty of Count Nineteen and not guilty as to all other counts. Horvat and Orpheus were found guilty of all counts. Drew was found guilty of Count One and Counts Seven through Thirteen and not guilty on Counts Fourteen through Eighteen. Rosan was acquitted on all counts.

On June 6, 1975, Judge Bonsal sentenced Blitz to one year in prison and fined him \$5,000 on Count Nineteen. On June 16, 1975, Horvat was sentenced on Count One to six months in prison and placed on probation for two years following service of his prison sentence; imposition of sentence was suspended on Counts Seven through Eighteen. On May 22, 1975, Orpheus was sentenced to three months imprisonment on Count One and placed on probation for two years following service of his jail sentence; imposition of sentence was suspended on Counts Seven through Eighteen. On the same day, Drew was sentenced to six months imprisonment on Count One and placed on probation for two years upon the expiration of his jail term; sentence was suspended on Counts Seven through Thirteen.

All appellants are at liberty pending appeal.

Statement of Facts

A. The Government's Proof

The Government's proof, presented through the testimony of twenty-five witnesses and approximately 150 exhibits, established that appellants Drew, Horvat and Orpheus and their co-conspirators participated in a massive scheme to manipulate and raise the market price of the common stock of Elinvest, Inc. and to sell it by means of fraudulent representations to innocent purchasers. It also showed that Blitz, a mutual fund portfolio manager for the Astron Fund, a West Coast organization, accepted a \$25,000 bribe from George Van Aken in return for Blitz' decision to have the Astron Fund purchase 25,000 shares of Elinvest, which Van Aken controlled, for \$125,000.*

In early 1971 Van Aken arranged for the purchase of 50,000 shares of Leisure Time Marine Corp. (LTMC) stock for \$50,000 by his father-in-law, John Bradley (Tr. 434-36; GX 2A, 2B).**

He also assisted a personal friend, Yale Law School Professor Steven Duke, in purchasing 55,000 shares of LTMC for \$7,500 (Tr. 439-42, 811), lending the money to Duke for the purchase (Tr. 440-442; GX 8A and 8B). During this period Van Aken was a major creditor of LTMC (Tr. 402-407; GX 63A-F, 73).

In March of 1971 Van Aken knew that Elinvest was a "shell corporation" with minimal assets and that Elinvest, unlike LTMC, was a "publicly-traded vehicle", that is, its common stock could be traded over-the-counter and in fact was trading at \$4 per share (Tr. 416, 805, 1132;

* Co-conspirators Van Aken, McLeod, Gerstenzang, Ross and Rosenthal testified for the Government at trial.

** "Tr." refers to the trial transcript. "GX" refers to Government exhibit.

GX 90). Additionally, he knew relatively few shares of Elinvest were publicly held, and therefore it would be easy to drive up the price of stock (Tr. 416-419).

With these facts in mind, in April of 1971, Van Aken, with the assistance of Hill, a New York securities attorney and corporate counsel to LTMC, instituted the procedure, purportedly pursuant to Rule 133 of the Rules of the Securities and Exchange Commission relating to the Securities Act of 1933, to have Elinvest acquire the assets of LTMC in return for a distribution of Elinvest stock to the shareholders of LTMC on a pro rata basis. It was agreed by Van Aken and Hill that by using this procedure they could selectively control whose newly-acquired shares of Elinvest would be freely tradable or marketable (Tr. 420, 422-425). Hill, after being told by Van Aken that Van Aken wanted to push the price of Elinvest up to approximately double its then selling price, accepted his firm's legal fees in shares of LTMC stock which would ultimately be converted into free-trading Elinvest stock (Tr. 422-425).

The acquisition by Elinvest of the assets of LTMC was consummated on April 26, 1971 (Tr. 429-30; GX 6). The terms of the agreement stated that LTMC shareholders would become Elinvest shareholders and receive 1.4 shares of Elinvest for each share of LTMC they formerly held (Tr. 429-431; GX 6).

On April 27, 1971, one day after the acquisition, Hill notified the Continental Stock Transfer Company of the acquisition by letter and instructed the company to issue Elinvest shares to all former shareholders of LTMC. Hill advised Continental that all the Elinvest certificates issued should bear restrictive legends with the exception of those certificates to be issued to Bradley, Duke, Hill and Hill's

two law partners.* There were approximately 48 LTMC shareholders at the time of the acquisition (Tr. 84-89; GX 89; 1D-1H).

As a result of Hill's actions, free-trading Elinvest stock was issued in the names of Bradley, Duke, Hill and his two partners. The remaining former shareholders in LTMC received restricted Elinvest certificates (Tr. 84-89, 97-103).

In early May, 1971, Bradley and Duke received unrestricted, free-trading shares in Elinvest in their names. Bradley received 70,000 shares and Duke 77,000 shares (Tr. 434-442, 97-98; GX 1J).

In late May or early June, 1971, Van Aken called Blitz and offered him \$25,000 if Blitz as portfolio manager of the Astron Fund would purchase on behalf of the Fund 25,000 shares of Elinvest which were in John Bradley's name for \$5.00 per share.** Blitz responded that he would let Van Aken know at a subsequent date (Tr. 454-455). Several days later Van Aken and Blitz again spoke on the telephone and Blitz stated that he was interested in buying Bradley's 25,000 shares of Elinvest for the Fund. Blitz also asked Van Aken if the \$25,000 was still

* Restricted shares, as opposed to free-trading shares, are those which bear the legend that they "may not be sold, transferred, pledged, hypothecated or otherwise disposed of in the absence of one, an effective registration statement for such securities under [the Securities] act, or two, an opinion of company counsel that such registration is not required." Hill's letter to the transfer agent brought Duke's, Bradley's, his own and his two partners' shares within the latter exemption. (Tr. 84-89; GX 1G)

** Van Aken testified that he had an agreement with his father-in-law, Bradley, whereby Van Aken would take the benefit of everything in excess of \$100,000 from the sales of Bradley's stock. To the extent that Bradley participated in the plan to sell his stock, he acted as Van Aken's nominee (Tr. 436, 746).

a part of the deal because he needed the money for his brother who was having some difficulties with the law (Tr. 455-456). At this time, late May or early June, 1971, Blitz, as portfolio manager of the Astron Fund, had total discretion in connection with what stocks should be purchased for the fund. He was also a Vice President of the fund (Tr. 349-351). Van Aken indicated that the money was still available and would be paid to Blitz as soon as the purchase of the shares by the fund was settled (Tr. 456). On June 9, 1971, Blitz had the Astron Fund purchase 25,000 shares of Elinvest for \$125,000 through the R. J. Rosan & Co. brokerage firm in New York (Tr. 359-360; GX 64-B), where Van Aken had informed Blitz that the stock would be available. Subsequently, Blitz came to New York, called Van Aken and told him he wanted the \$25,000 (Tr. 459). Van Aken responded that he would get the check from Bradley (Tr. 461). Thereafter Van Aken contacted Bradley, had him draw a \$25,000 check payable to Blitz, met Blitz at the Unicorn Restaurant in New York and gave him the check (Tr. 461-462; GX 15). The check to Blitz was post-dated to June 18, 1971 (Tr. 462; GX 15). The settlement date* on the purchase through Rosan by the fund was June 16, 1971 (Tr. 316; GX 64-B). The check was deposited on June 18 or June 19, 1971, by Blitz in a bank in Tacoma, Washington (GX 15).

In March of 1972 Van Aken contacted Blitz in connection with the \$25,000 Blitz accepted for the fund's Elinvest purchase. He told Blitz that the SEC was investigating the Elinvest situation and that, to protect them both, Blitz should return the money to Bradley so that they could subsequently claim it was a loan. Blitz responded that he didn't have the money at that time (Tr.

* The "trade date" on a stock purchase from a broker is the date the contract to buy is consummated. The settlement date is the date the purchase money is due (Tr. 3151).

559). Thereafter, Blitz would not accept Van Aken's phone calls. Van Aken then employed Peter Rosenthal as an intermediary to get the \$25,000 back from Blitz and in August 1972 Blitz sent Bradley a check, claiming in an accompanying letter to Bradley that the check was for re-payment of a loan (Tr. 559-566; GX 19B, GX 21A). There was never a loan from Bradley to Blitz (Tr. 556, 1012-1014). When Rosenthal called Blitz at Van Aken's request and told him that Van Aken wanted the \$25,000 treated as a loan because of an investigation, Blitz asked Rosenthal if Rosenthal thought that this was just another scare tactic by Van Aken. Rosenthal told Blitz that he didn't know and Blitz responded that Van Aken's demand for the return of the money was "unfair" (Tr. 130-133).*

At or about the end of June, 1971, Van Aken paid, through his father-in-law, John Bradley, \$50,000 in cash to Peter Rosenthal in return for Rosenthal's assistance in getting two of Rosenthal's securities customers to purchase 25,000 shares of Bradley's Elinvest stock for \$100,000 through the Rosan brokerage firm. The cash was delivered on Van Aken's instructions from Bradley to Steven Duke, who then delivered it to Rosenthal (Tr. 481-487). Rosenthal testified that Duke delivered the \$50,000 in cash at the First National City Bank on 57th Street in New York City. The cash was given to Rosenthal in the vault area of the bank (Tr. 126-129).

* The Government introduced proof of two prior similar acts on the part of Blitz. In or about July of 1970 Van Aken paid Blitz \$10,000 in connection with a purchase by the Astron Fund of 10,000 shares of a stock called On-Site Energy Systems (Tr. 576-578). The Government also introduced evidence through Peter Rosenthal that in August of 1971, while Rosenthal was employed at the New York brokerage company of Greenman & Co., he arranged to pay Blitz \$10,000 in cash if Blitz would have the Astron Fund purchase a substantial block of stock called American Community Systems. The stock was purchased and the cash was sent to Blitz in the mail. Blitz later confirmed to Rosenthal that he received the cash. (Tr. 142-144).

Toward the end of June 1971, Van Aken met Santini and Orpheus at Neary's Pub in New York City and discussed the possible sale of some of the Elinvest stock in Duke's name (Tr. 495-496). A meeting was then arranged among Duke, Van Aken and Orpheus. During this meeting, Orpheus told Duke that he, Orpheus, worked for Ridgway McLeod & Associates, a stock brokerage firm located in New Jersey, and that he would like Duke to give him 10,000 of his Elinvest shares so that Orpheus could sell them. Duke agreed and gave Orpheus 10,000 shares. Shortly thereafter, Santini, Orpheus and Julie Gladstein went to Van Aken's apartment at 400 East 56th Street, New York, New York, where Santini told Van Aken that he and Orpheus had not located an office in New York and asked Van Aken if they, along with a couple of salesmen, could use the apartment as a place from which to sell Duke's Elinvest stock (Tr. 497-499). Van Aken agreed and said that his plan was to raise the price of the stock to about \$7 or \$8 per share in the open market at which time he would bring in some institutions to buy up a large block of Elinvest stock (Tr. 498-499).*

* Van Aken testified that he never intended to have institutions buy the stock when it reached a certain price level and that when he told this to Santini, Orpheus and others, he lied. His true intention was to sell the shares of Elinvest stock in the name of John Bradley (Van Aken's father-in-law) into the market place for as high a profit as possible while his associates attempted to raise the price of the stock by generating buying in the market place. (Tr. 692, 865-867). This procedure is commonly known as "backdoor" and occurs when two or more people agree to move the price of the stock up by generating buying for it and one of the parties, without the knowledge of the other or others, secretly sells the stock back into the market thereby adding to the supply of the stock in the market and reducing its price. (Tr. 473-474, 534-536), 1208-09.) In July 1971, Van Aken gained control of an additional 200,000 shares of Elinvest stock which he had "freed-up" and which he took to Nassau, Bahamas where he began to sell them into the market thereby further negating the efforts of his associates to reduce the supply of the stock in the public market place and thus elevate the price. (Tr. 472-477, 852-859).

During this same period of time, Santini and Orpheus approached McLeod, then the president of Ridgway McLeod & Associates (RMA), and offered him the commissions and profits on their trades in Elinvest stock if he would allow them to put the trades through RMA. They told McLeod that they would put their customers in the stock and then call McLeod and have him do the paper work. They also informed McLeod that Elinvest stock was then selling for approximately \$4 per share and that when the price reached \$7 per share a fund would buy back the stock from the customers through RMA. Santini and Orpheus also told McLeod that they would be working out of Van Aken's apartment. McLeod agreed to this plan (Tr. 1489-93).*

On June 29, 1971, Santini, Orpheus, Gladstein, Viggiano, Gerstenzang, Van Aken and Bradley met at Van Aken's apartment. Van Aken again said that the plan was to raise the price of Elinvest stock from \$4 to over \$6 per share, at which point a mutual fund would purchase the stock. Santini confirmed this statement and informed the group that they would be using RMA as the broker in the trades of Elinvest stock (Tr. 499-500, 1620-26). At this time, Orpheus, Gerstenzang and Gladstein began calling customers and market makers** on the two telephones in Van Aken's apartment in an attempt to sell Duke's stock and to raise the price of the stock by manipulating the supply and demand in the market for it (Tr. 500, 513-515).

* In May 1971, prior to these discussions with respect to Elinvest, McLeod had entered into a similar arrangement with Santini, Orpheus, Gladstein, Gerstenzang, Drew and another person in connection with purchases of a stock called Integrated Automated. (Tr. 1484-89, 1518)

** A "market maker" or trader as he is also called, acts as principal in purchasing and selling securities for his own account or the account of his firm. His profit is derived from the difference in price between what he "bids" (buys) the securities and the "asks" (sells) the securities. By trading the securities he in effect "makes a market" in those securities.

Gerstenzang and Gladstein and, to a lesser extent, Viggiano began calling prospective buyers in an attempt to induce them to purchase Elinvest stock. When a prospect was solicited to buy the stock, he would be told that the stock was selling for approximately \$4 per share but that when the price rose to over \$6 pre share a mutual fund would be buying the stock and, if the prospect would hold the stock until the salesmen told him to sell it, the purchaser would make money (Tr. 1629, 1630, 1631).

For selling Elinvest stock in this fashion, the salesmen were to receive \$.50 to \$.75 for each share of Elinvest they sold (Tr. 1625). Gerstenzang, who used the apartment 3 or 4 days a week as one of the salesmen, was barred by the SEC in 1967 from selling securities; Orpheus and Santini were aware of this (Tr. 1619, 1632, 1634-35). The salesmen did not tell their prospects that they were not employed by RMA or that they were calling them from an apartment rather than a licensed brokerage firm (Tr. 1629-1631). Duke, in whose name shares were being sold from the apartment, was present on several occasions in the apartment with Van Aken and Santini when customers were solicited to purchase this stock over the telephone (Tr. 831, 1673-76, 1684-86).

In furtherance of the plan to raise the price of Elinvest stock, Orpheus placed telephone calls to various market makers. When these brokers indicated to Orpheus that they were nervous about having purchased too many shares of Elinvest stock, Orpheus would buy the stock from these brokers in the name of RMA, then telephone McLeod and tell him that RMA had just bought a certain amount of Elinvest stock from a particular broker (Tr. 514-15, 1645-46). On one occasion at the apartment, Orpheus told Van Aken and Santini that two brokers were complaining that they were buying up stock from the market and there were no buyers to take the stock off

their hands. Van Aken suggested that he, Santini and Orpheus pay these brokers (Tr. 1642-43).

Additionally, when one of the salesmen in the apartment sold Elinvest stock, he would inform Orpheus of the details of the sale and Orpheus, in turn, would telephone McLeod in New Jersey and inform him of the sale. McLeod would then call the customer and confirm that customer's purchase by mail (Tr. 526-27, 1491-92, 1496-1508; GX 27, 28A-F, 30A-O).

The selling operation in the apartment, which was supervised by Santini, took place on the telephones located in one room, the living room, the dimensions of which were 26' 7" by 13' 6". This was the only room which the members of the selling group occupied. (Tr. 1629-30, 1634, 1648-49; GX 9)

This selling operation lasted for several days between the hours of 10:00 A.M. and 4:00 P.M. (Tr. 513-19.) Van Aken then asked Santini to stop using the apartment to sell Elinvest stock. Santini told Van Aken to speak to Drew. Drew came to the apartment on July 2, 1971, and told Van Aken that Santini needed the use of the apartment for the salesmen and that if Van Aken objected Van Aken would be "pushing up daisies." (Tr. 517-25) Santini and the salesmen then continued to use the apartment on the average of three or four times per week from late June through September, 1971. (Tr. 528, 1632.)

Dean Willeford, the general partner in 1971 of a Laguna Beach, California, investment partnership named Newport Associates, testified that on July 1, 1971, he received a telephone call from an individual who identified himself as Santini. Two other people, who identified themselves as Van Aken and Orpheus, also participated in the conversation. He was told that a mutual fund was interested in Elinvest and intended to buy it when it

reached \$7 per share. Willeford was also guaranteed that if he purchased Elinvest he could not lose money. Orpheus told Willeford that he (Orpheus) was a trader at RMA.* Van Aken said he was the President of Elinvest. In response to Willeford's inquiry about references for the company, Santini told him to call McLeod or Eric Blitz in the State of Washington. Santini provided a telephone number for Blitz.** Willeford, however, did not call Blitz. Willeford then called McLeod in New Jersey and purchased 1,000 shares of Elinvest at \$5 per share. (Tr. 1926-42; GX 59, 59 A-B, 59 E)

On July 19, 1971, Orpheus called Willeford and, after being told by Orpheus that Elinvest would soon reach \$7 per share and that the mutual fund would then come in, Willeford purchased another thousand shares at \$5.25 per share on behalf of Newport Associates. This order was placed with Orpheus. (Tr. 1939-47; GX 59 C-D) After this transaction, the price of Elinvest decreased steadily. Willeford sold the stock on December 31, 1971, for \$.50 per share. (Tr. 1948-65; GX 59 F-G)

Norman Pollisky testified that, while employed as a registered representative at the New York stock brokerage firm of Rimson and Company in late June 1971, he met with Santini, Drew, Gladstein and an unidentified person at McCoy's, a bar located in the vicinity of his office. (Tr. 1831-33, 1836). At that meeting, Drew, Santini and Gladstein asked Pollisky to purchase 2,000 shares of Elinvest on behalf of his firm when the price of stock reached the \$5.50 to \$6.00 per share range and offered him \$50 for every one hundred shares so purchased. Pollisky told

* Orpheus admitted in his Grand Jury testimony that he talked to Willeford on the telephone once or twice. This testimony was introduced into evidence at the trial. (Tr. 2079-81.)

** The phone number was (206) BR 2-0327 (GX 59 E). Blitz testified later on cross-examination that this number in 1971 belonged to his employer. (Tr. 2450.)

this group that before he did anything he wanted to see a report on Elinvest. Pollisky was informed that he would be provided with such a report and that he would be contacted in the future. (Tr. 1833-36)

One week later, while at his office, Pollisky received a telephone call from Drew. Drew asked Pollisky to buy 500 shares of Elinvest stock that day. Pollisky told Drew that he had not received a report on Elinvest. Drew then told Pollisky to buy the 500 shares and Pollisky said he would see. (Tr. 1836-37)

Pollisky did not buy the 500 shares. On the following day, Drew, who was at Van Aken's apartment, again called Pollisky. When Pollisky told Drew that he had not bought the stock, Drew told Pollisky that if he did not buy the 500 shares of Elinvest stock Drew would punch him in the mouth. When Pollisky told Drew he wanted to speak to Santini, Drew told Pollisky that he represented Santini. Pollisky subsequently spoke to Santini and thereafter purchased 200 shares of Elinvest stock for his brokerage firm. (Tr. 1636-37, 1837-45)

On cross-examination by counsel for Drew, Pollisky stated that, based on the statements made at the meeting at McCoy's, Pollisky suspected that the price of Elinvest stock was being manipulated by the individuals who attended that meeting. (Tr. 1844)

Gerstenzang testified that Drew was at the apartment three or four times during the month of July 1971. (Tr. 1634) On one such occasion, in the latter half of July 1971, Gerstenzang complained that he was not being paid enough for selling the stock. Drew told Gerstenzang that if he wanted to get paid he had to make telephone calls and that if he did not make telephone calls Drew would work him over. (Tr. 1640)

Gerstenzang did not come to the apartment the following week and Drew telephoned Gerstenzang at home. When Drew told Gerstenzang to return to work and Gerstenzang refused, Drew told Gerstenzang, "Well, I think you better come back because you are involved with us and you are part of the group and you better come back, otherwise I will come out and teach you a lesson." Gerstenzang returned to the apartment. (Tr. 1640-41)

All told, over 10,000 shares of Elinvest stock were purchased from other brokers in the public market by Orpheus on behalf of RMA and 3,000 shares in the name of Duke aggregating \$15,000 were sold to members of the public by the people in the apartment in the summer of 1971. (Tr. 1491-92, 1496-1508; GX 27, 28A-F, 29A-F, 30A-O)

When RMA received payment from the purchasers of the stock in Duke's name sold from Van Aken's apartment, McLeod gave most of the proceeds to Orpheus on Orpheus' and Santini's instructions. Three checks totaling \$4,250 were made payable to Orpheus and endorsed by him. (GX 29, B, C, E) Another check payable to cash in the amount of \$4,750 was endorsed and cashed by Orpheus, who was never employed by RMA. (Tr. 1484, 1508-1513, 1578-91; GX 29A)

In May of 1971 Van Aken was introduced to Robin Baron, the principal in the New Jersey stock brokerage firm of Baron & Co., by Hill at Hill's law office in New York. At this time Baron told Van Aken that he heard that Van Aken was the "John Dillinger of Wall Street." (Tr. 488) On the same occasion Van Aken met George Linder * at Hill's offices.

* Linder was named as an unindicted co-conspirator in the indictment.

Subsequently, Van Aken introduced Linder to Duke and an agreement, recommended to Duke by Van Aken, was struck between them that Linder would find a broker to sell 50,000 shares of Duke's Elinvest stock for 25% of Duke's profits from the sale of his stock. (Tr. 498-492; 813) Linder informed Van Aken that he would make certain that Duke's stock would be sold to long term investors and would not be sold into the market to other brokers. (Tr. 815-820). Baron & Co. agreed to handle the trades. Shortly thereafter, Van Aken personally informed Baron that Van Aken had a substantial interest in Elinvest and that, if Baron would have his customers hold the stock for six months, Van Aken would bring in some institutional buying which would buy up the shares sold to Baron & Co.'s customers. Baron told Van Aken that he (Baron) would tell his customers to hold the stock for six months. (Tr. 492-493).

Beginning in May of 1971 and continuing through August of 1971, Baron and Co. sold to its customers approximately 35,000 shares of Duke's Elinvest stock for \$4 per share. These shares were purchased by Baron and Co. from Duke for \$3 per share. Most of the shares were sold by Baron & Co. on a no-risk basis, that is, the stock was not purchased from Duke for \$3 per share until after it had been sold at \$4 per share to customers. Duke received \$105,000 from Baron & Co. for the sale of his shares from May 14, 1971 through August 16, 1971. (Tr. 2133-2141; GX 42A, 42B, 43, 44, 45A-F, 46A, 46B, 45G, 47, 48A-D).

Horvat, a Baron salesman, personally made \$3,637.50 selling Elinvest stock in a nine-week period to various customers on behalf of Baron & Co. (Tr. 2135; GX 81, 82, 83, 84A-84I) Horvat received \$.50 for each share of Elinvest he sold. (Tr. 1763; GX 53). During this same nine week period Horvat made \$63.75 in commissions for all other stocks he sold for Baron & Co.

(Tr. 2133-35, 2175-79; GX 84A-I) Michael Separ testified that Horvat called him on or about June 11, 1971, and told him that he should buy Elinvest for \$4 per share from Baron & Co. because it was then selling on the open market for \$5 per share. Horvat stated that the price was going to go to 10 or 12. When Separ became hesitant, Baron got on the phone and told him the same thing, and indicated that they (he and Horvat) had inside information. (Tr. 1765-67) Baron also told Separ that he should not resell the stock for six weeks (Tr. 1767). Separ told them he wanted to think about it. The next day Horvat called him back and Separ agreed to buy 200 shares at \$4 per share. (Tr. 1768-1770; GX 56A) Several days later Separ called Horvat seeking to sell the 200 shares of Elinvest he had just bought. Horvat responded that Separ shouldn't sell because that would depress the market in the stock. Baron again came on the phone and told Separ not to sell. Separ then asked for his stock certificates and was told that some paper work had to be taken care of and that it would take time. (Tr. 1770-71) Separ never received his stock certificates for the shares he purchased. (Tr. 1771)

Three other Government witnesses—Thomas Nash (Tr. 1799-1803, 1906), Frank Capsouras (Tr. 1743-49), and Archibald Denny (Tr. 2066-73)—also testified that they bought Elinvest stock from Baron & Co. on Horvat's representations that the price of the stock would go up rapidly. Nash and Denny, like Separ, did not receive their stock certificates.

Horvat testified in the grand jury on May 2, 1973, that he never made price projections regarding Elinvest stock while employed at Baron & Co. He also testified that he was told by Baron, prior to the time that Baron & Co. began to sell Elinvest, that Van Aken had taken control of Elinvest and intended to make the company grow. Horvat testified under oath in the SEC on May 3,

1972, that he had never heard of Van Aken until after he had started his own firm, which was after he left Baron & Co. (Tr. 1763-64, 2202; GX 53)

Baron also personally sold Elinvest stock to David Kauffman and Matthew Petersen after telling them that the stock was going to rise rapidly in price. These individuals also never received their Elinvest stock certificates from Baron & Co. although they specifically requested them. (Tr. 1690-99, 2043-49)

B. The Defense Case

Blitz testified in his own behalf that he came to New York from Tacoma, Washington on June 6, 1971. (Tr. 2299) While in New York he talked to Van Aken and decided on June 9th, based on Van Aken's recommendation, to have the Astron Fund purchase 25,000 shares of Elinvest stock through the brokerage firm of R. J. Rosan & Company. Blitz denied talking to Van Aken about receiving \$25,000 from Van Aken for the purchase (Tr. 2302-07) Blitz returned to Tacoma on June 11, 1971. (Tr. 2316) On June 14, 1971, Van Aken called Blitz in Tacoma, sensed that something was bothering Blitz, and asked Blitz what the trouble was. Blitz told Van Aken that his brother, who was having difficulties with the law and his partners in a criminal venture, needed \$20,000 badly and Blitz couldn't raise it for him. Van Aken offered to lend Blitz the money but Blitz refused because it would create a conflict of interest for Blitz. Van Aken then suggested that Bradley could lend Blitz \$25,000 and Blitz accepted. Thereafter, Blitz received Bradley's check, dated June 18, 1971, in the mail at his office, and deposited the proceeds in his bank on the same day. (Tr. 2317-22) He paid the loan back with interest, on or about August 11, 1972. (Tr. 2340) After the money was deposited, Blitz invested it in the stock market. From June of 1971 to August of 1971, Blitz gave \$5,000 to his brother's wife. (Tr. 2326).

Blitz also denied receiving other moneys from either Van Aken or Rosenthal in return for having the Astron Fund buy other stocks. (Tr. 2287-88, 2314, 2329)

On cross-examination, Blitz testified that in August of 1971 he borrowed money from the Pacific National Bank in Tacoma, Washington. (Tr. 2416) He testified that he could not recall whether the bank asked him for a financial statement at the time, and, therefore, couldn't recall whether he reported his loan from Bradley to the bank. He testified that, if the bank asked him for a financial statement at the time, he probably did not report the Bradley loan because he did not wish to advertise his personal problems concerning his brother. (Tr. 2416-2419)

Blitz further testified on cross-examination that he did not report the Bradley loan to the New York Stock Exchange because (1) he was not aware of the fact that he was required to do so, and, (2) even if he was aware of the fact that he was required to report the loan, he didn't do so because he didn't wish his employer to have knowledge of his personal problems. (Tr. 2419-2421, 2438-40) Blitz also testified that, in September 1971, he believed that he only had to report his bank obligations to the New York Stock Exchange and not his personal obligations. (Tr. 2435-36)

Blitz testified that as the \$25,000 check, dated June 18, 1971, was mailed to him in Tacoma and deposited on the same day, it must have been post-dated. He did not know, according to this testimony, why the check was post-dated. (Tr. 2409-2411)

Blitz also testified that he borrowed the \$25,000 because his brother told him that he would need \$20,000 in connection with threats which were made against his brother. (Tr. 2411-2414) Within two weeks after he re-

ceived the check, Blitz invested the entire \$25,000 in the stock market. He did not tell his brother that he received the money because three days after he received it his brother had gone to San Diego to surrender himself to the authorities. Blitz thereafter invested the entire \$25,000 in the stock market in the event that he needed it to help his brother's wife. (Tr. 2413-2414)

Orpheus testified in his own defense that he was employed with various brokerage firms as a registered trader from 1961 to the beginning of 1971. (Tr. 2479-84) In June 1971 he was introduced to Van Aken by Santini at Van Aken's apartment. (Tr. 2486) Van Aken told Orpheus that he wanted to sell some of Duke's stock and Orpheus called McLeod and introduced Van Aken to him over the telephone. (Tr. 2495-98) Thereafter, Van Aken gave 10,000 shares of Duke's stock to Orpheus, who brought the certificates over to McLeod's brokerage firm in New Jersey. (Tr. 2501)

Orpheus spent two months working on the sales operation at Van Aken's apartment but denied ever calling a retail customer in this period. (Tr. 2528) He received five or six hundred dollars in cash for this work from Santini. (Tr. 2525-26)

On July 19, 1971, Orpheus talked to a potential customer named Willeford. He told Willeford what Van Aken had told him about Elinvest stock, that is, a mutual fund was going to buy everyone out when the stock reached \$7 per share. (Tr. 2528-29) Subsequently, Willeford purchased 2,000 shares for \$10,500. (Tr. 2530-32)

Orpheus denied McLeod's testimony that he directed McLeod to give him the proceeds from the sales of the stock in Duke's name. He testified that he did cash \$9,000 in checks but gave the cash to Santini and McLeod and received personally only five or six hundred in cash

from Santini. He was given his money at the same time that the salesmen, Cerstenzang, and Gladstein, were given theirs by Santini. (Tr. 2507-26, 2532-33.) He walked out of the sales operation in September 1971. (Tr. 2536)

Orpheus admitted to perjury during his sworn testimony before the SEC on July 17, 1972, and evasiveness during his Grand Jury testimony on January 24, 1973. He claimed that he had been afraid of Santini. (Tr. 2490-95)

On cross-examination, Orpheus testified that he didn't tell the truth in the SEC because he wanted to protect Santini. (Tr. 2552) He admitted that Van Aken told him in June 1971 that if the price of Elinvest reached \$7 per share a mutual fund was going to come in and buy a large block. He testified that Santini told Van Aken that Orpheus could help in raising the price of Elinvest to \$7 (Tr. 2575-77) and that the purpose of the selling operation of Elinvest at the apartment was similar to the previous selling operation in which he had participated concerning Integrated Automated; to wit, raise the price of the stock several points. (Tr. 2553-55, 2630-32)

He testified further on cross-examination that his function at the apartment was to contact market makers in Elinvest, as he had done with Integrated Automated stock, find out where the stock was, and then direct brokers, who wished to sell the stock, to McLeod so that McLeod could buy the stock on behalf of RMA from these brokers and then sell it to the members of the public who were solicited by the salesmen in the apartment. (Tr. 2555-58, 2600-02, 2595-6, 2598) Orpheus also stated that after he spent about one and one-half weeks at the apartment he believed that payoffs were being made to brokers to get them to help raise the price of Elinvest stock. (Tr. 2628-30)

Orpheus further testified that Drew was at the apartment three or four times in the summer of 1971. (Tr. 2578) On one such occasion, Orpheus observed Drew, Van Aken and Santini sitting together. (Tr. 2647-48) On another occasion, Orpheus saw Drew and Santini talking together. (Tr. 2648-49) Orpheus further admitted that the manner in which the selling group was paid was that Santini, at the RMA office, would call each of the people separately into a private office and, out of the presence of the others, pay each person in cash. Drew was observed by Orpheus to have been called into the private office by Santini in this fashion on one occasion. (Tr. 2646)

Horvat called George Linder in his behalf.* Linder testified that in approximately the second week of May 1971 he agreed with Duke to find a broker to sell 50,000 shares of Duke's Elinvest stock in return for 25% of the proceeds received by Duke. (Tr. 3111-12) Linder found Baron & Co. for this purpose. After this agreement Linder had a "due diligence" ** meeting at Baron & Co. Present at this meeting were Baron and several of his salesmen, including Horvat. During this meeting, Linder, after analyzing the merits of Elinvest, told those present that Elinvest stock was a speculative investment for a long-term investor. He recommended that the stock be sold to customers who could hold it for over six months. (Tr. 3129-48)

* Linder was named as an unindicted co-conspirator in the indictment.

** Linder described a "due diligence" meeting as one designed to permit a brokerage firm to evaluate properly the merits of a particular company whose shares it contemplated selling. (Tr. 3130-31)

Linder further testified that Baron had said that he wanted to make certain, before he involved his company with Elinvest, that it was a "good and honest and legitimate" situation. (Tr. 3109-10)

On cross-examination Linder testified that he and his partner, Michaelina Martel, received approximately \$26,000 from Duke for the placement of Duke's stock with Baron & Co. Linder and Martel gave one-third of this amount to Robin Baron. Linder testified that he and Martel owed Baron \$10,000 in connection with an underwriting contract they had with Baron, and that they (Linder and Martel) had decided that they would pay Baron with the proceeds they received from Duke. (Tr. 3158-3161) Linder told Duke of his arrangement with Baron and asked Duke to make several checks payable to a Mr. Edelman and an organization known as the "211 East 51st Street Corporation," with which Edelman was associated. Edelman was Baron's landlord. (Tr. 3144, 3158- 3161) Linder testified that he was told by Baron that Baron owed Edelman the money and it would be easier, therefore, to have his money paid directly to Edelman. (Tr. 3161, 3176-3177) Linder testified that he did not know whether Baron had earned the money which was directed to his benefit by Linder in connection with the underwriting agreement he had with Baron. (Tr. 3218)

Linder further testified that Van Aken had told him, prior to the time that Baron & Co. had begun to sell Duke's stock, that Bradley had a substantial block of free-trading Elinvest stock. Van Aken told Linder to tell Baron that Van Aken would make certain that Bradley would not sell his stock into the market until Baron had sold all of Duke's stock. Linder thereafter conveyed this to Baron. (Tr. 3239-3245). Linder also told Baron—prior to the time that Baron & Co. began to sell Duke's stock—that he was told by Van Aken that Van Aken would have a mutual fund purchase a substantial block of the stock

when and if the price reached approximately \$7 per share. It was Linder's understanding that if this occurred all owners of the stock at that time would make a profit (Tr. 3246-53).

Linder further testified that prior to the time Baron & Co. began to sell Elinvest he had heard that George Van Aken was under investigation with respect to some type of securities violation and that he told this to Baron and may have told it to Baron's salesmen, one of whom was Horvat, at the "due diligence" meeting. (Tr. 3255-61)

Finally, Linder testified that he never gave anyone price projections concerning Elinvest stock. (Tr. 3261)

Horvat did not take the stand in his own behalf.

Drew did not testify in his own behalf. He called one witness, Steven Duke, who invoked his Fifth Amendment right against self-incrimination. (Tr. 2269-72)

C. The Government's Rebuttal Case

The Government called Charles Hellar, Vice-President of the Pacific National Bank of Washington, in rebuttal. Hellar testified that on August 10, 1971, Blitz submitted a signed personal financial statement to his bank. (Tr. 3003-06; GX 95) Blitz listed his then existing liabilities in this statement and there was no reference to a loan from Bradley. (GX 95) The financial statement did not require Blitz to disclose the reasons for his debts, but did require that he disclose the debts themselves. (Tr. 3009; GX 95)

ARGUMENT

POINT I

The evidence of the guilt of Horvat, Orpheus and Drew was more than sufficient.

Horvat, Orpheus and Drew claim that the evidence was insufficient to sustain their convictions on any count of the indictment. Such contentions ignore the record, viewing the evidence in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Arroyo*, 494 F.2d 1316, 1317 (2d Cir.), *cert. denied*, — U.S. —, 95 S. Ct. 46 (1974). In considering the sufficiency of the evidence, the Government deals with each appellant separately.

A. The Conspiracy Count

1. Orpheus

The Government's evidence showed that Orpheus first learned of the conspiracy when he and Santini were told by Van Aken in late June 1971 that the plan with respect to Elinvest was to raise the price of the stock to \$7 or \$8 in the open market. (Tr. 498-99). Thereafter, Santini and Orpheus approached McLeod and asked him to do the paper work on their trades in Elinvest. They told McLeod that when the price of Elinvest reached \$7 per share a fund would buy back the stock and from their customers through McLeod's brokerage firm (Tr. 1489-93). Subsequently, the sales operation at Van Aken's apartment began with Orpheus participating. As Orpheus knew, Gerstenzang, one of the "salesmen" in this operation, which lasted several months, had been previously barred from selling securities. The "salesmen" did not tell their customers that they were not employed by RMA. Orpheus,

when calling market makers on the telephone from the apartment, did not tell these individuals that he was not employed by RMA. When Orpheus spoke to Willeford, a customer for Elinvest, he told him that he (Orpheus) was a trader at RMA, which was untrue. When one of the "salesmen" in the apartment would convince someone to buy Elinvest, he would report the details to Orpheus and Orpheus would call McLeod and inform him of the sale. McLeod would then call the customer and confirm the customer's purchase by mail. (Tr. 500, 513-15, 1629-31, 1642-46, 1926-42)

Orpheus himself admitted that after he spent approximately two weeks in the apartment he believed that pay-offs were being made to brokers to get them to help raise the price of Elinvest. He further admitted that the objective of the operation in the apartment, of which he was a part, was to raise the price of Elinvest several dollars per share. (Tr. 2553-55, 2628-32).

Orpheus' argument on sufficiency amounts at best to an attack on the credibility of Government witnesses who testified against him. This was a matter for the jury to decide. *United States v. Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963). There was sufficient evidence in the record for the jury to determine that the sales operation at Van Aken's apartment was nothing more than a rank boiler room stock swindle and manipulation in which all the participants played a part. *United States v. Goldberg*, 401 F.2d 644, 647 (2d Cir.), *cert. denied*, 393 U.S. 109 (1968).

2. Drew

Drew's contention that the proof failed to show that he knew of the illegal methods of sale is belied by the record. The proof against him established that it was his function

to supply the necessary force and threat to keep the "boiler room" sales operation at Van Aken's apartment going. Drew's own admission in his brief (at 18) that his role was limited "to forcibly inducing others to sell" Elinvest stock is dispositive, without more, of his contention that he did not know of the illegal methods used to sell the stock. Indeed, it could hardly be doubted that Drew was aware that Elinvest customers were being defrauded since the proof was overwhelming that he was obliged to force individuals to sell the stock to these customers.

During the same period of time that the "boiler room" operation was in action, Drew, Santini and others offered a bribe to Norman Pollisky, a registered representative with a New York City stock brokerage firm, of \$50 for each 100 shares of Elinvest Pollisky would buy on behalf of his firm, up to 2,000 shares, if those purchases were made when the price of Elinvest rose to \$5.50 or \$6.00 per share. When Pollisky didn't buy, Drew called him from Van Aken's apartment and threatened him with bodily injury if he did not buy Elinvest immediately. Subsequently, Pollisky purchased 200 shares for his firm's account. (Tr. 1831-45)

When Van Aken asked Santini to stop conducting the sales operation from Van Aken's apartment, Drew told Van Aken that Santini needed the apartment for his salesman and that if Van Aken complained he would be "pushing up daisies." (Tr. 517-25) Moreover, when Gerstenzang, one of the salesmen, complained about what he was being paid for his work at the apartment, Drew threatened to beat him up if he did not make more telephone calls to customers. Of course, Gerstenzang never told prospective purchasers of Elinvest that he was being threatened to solicit customers to purchase Elinvest stock. Subsequently, when Gerstenzang refused to come back to the

apartment, Drew called him and stated, "Well, I think you better come back because you are involved with us and you are part of the group and you better come back, otherwise I will come out and teach you a lesson." (Tr. 1640-41).

Finally, Orpheus' testimony that Drew, like the rest of the members of the sales operation at Van Aken's apartment, received cash from Santini for his work entitled the jury to find that Drew's actions were designed to aid the objective of the "boiler room" operation, that is, to raise the price of Elinvest by reducing its supply in the open market and fraudulently to sell the stock to unsuspecting purchasers. (Tr. 2646) That Drew himself never telephoned customers from Van Aken's apartment with the exception of Pollisky is immaterial. It is not necessary for a person to be convicted of conspiracy that he engage in all actions in furtherance of the conspiracy. *United States v. Vega*, 458 F.2d 1234 (2d Cir.), cert. denied, 410 U.S. 982 (1972); *United States v. Kellerman*, 431 F.2d 319 (2d Cir.), cert. denied, 400 U.S. 957 (1970); *United States v. Kaufman*, 429 F.2d 240, 243 (2d Cir.), cert. denied, 400 U.S. 925 (1970).

In sum, Drew was a member of the conspiracy the goals of which were to manipulate the price of Elinvest stock and fraudulently to induce the public to buy that stock. Drew's function was to provide the muscle to keep that portion of the conspiracy which occurred at the apartment going, a function which Drew performed willingly and knowingly and for which he was paid.

In addition, Drew appears to rely on *United States v. Feola*, — U.S. —, 95 S. Ct. 1255 (1975); *United States v. Tavoularis*, 515 F.2d 1070 (2d Cir. 1975); *United States v. Hysohion*, 448 F.2d 343 (2d Cir. 1971), and *United States v. Steward*, 451 F.2d 1203 (2d Cir. 1971), in arguing that his conviction on all counts must be reversed for

failure by the Government to prove he knew the Elinvest stock was worthless at the time he was forcing people to sell it. Drew misapprehends the scope of the charges against him. Though the evidence established that the stock was worthless, it was the manipulative and deceptive manner in which the stock, regardless of its value, was sold that underlay the charges in the indictment. The proof of fraudulent practices in connection with the sale of Elinvest was sufficient to support a conviction. See 15 U.S.C. Section 78j (b), 17 C.F.R. Section 240.10b-5 and *S.E.C. v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 847-48, 849 (2d Cir. 1968) (*en banc*), *cert. denied*, 394 U.S. 976 (1969). Moreover, it can hardly be doubted given the evidence of Drew's activities, that Drew was aware that innocent purchasers of Elinvest were not getting value for their money.

3. Horvat

Horvat participated in the conspiracy by assisting his superior, Robin Baron, the principal of Baron & Co., to channel by fraud 35,000 of the Elinvest shares in Duke's name into the hands of Baron & Co.'s unsuspecting private customers and away from the public market so that the price of the stock in the public market would not be driven down.

Horvat, in a nine-week period beginning approximately at the middle of May 1971, sold 7,275 shares of Elinvest to Baron & Co.'s customers and earned for these sales \$3,637.50, or \$.50 for each share sold. During this identical nine-week period Horvat made only \$63.75 on sales of stocks for Baron & Co. apart from Elinvest. (Tr. 1763, 2133-35, 2175-79; GX 53, 81, 82, 83, 84A-I). His employment at Baron & Co., therefore, during this period was devoted almost exclusively to the sale of Elinvest stock.

Four Government witnesses testified that they were called by Horvat and told that they should immediately buy Elinvest because it was going to rapidly rise in price. Michael Separ's testimony was typical. He testified that he was called by Horvat on June 11, 1971, and told that he should buy Elinvest for \$4 per share from Baron & Co. because it was then selling in the open market for \$5 per share. Horvat stated that the price of the stock was going to rise to \$10 or \$12 per share. When Separ became hesitant, Baron got on the telephone and told him the same thing, and indicated that they (he and Horvat) had inside information. Baron also told Separ that Separ should not re-sell the stock for six weeks. Separ stated to them that he'd like to think about it. The next day Horvat called him again and convinced him to buy 200 shares at \$4 per share. Several days later, when Separ called Horvat seeking to re-sell the shares, Horvat told him that he shouldn't re-sell because that would depress the market in the stock. Baron again got on the telephone and told Separ not to sell. When Separ asked for his Elinvest stock certificates, Baron told him that this would take time. Separ never received the certificates and therefore could not sell the stock he owned. (Tr. 1765-71).

Thomas Nash and Archibald Denny also testified that they never received their Elinvest stock certificates after Horvat convinced them to buy Elinvest by representing that its price was going to rise rapidly. Nash testified that on about June 10, 1971, one day before Separ was told Elinvest would go to \$10 or \$12 per share, Horvat told him Elinvest would go to \$6 or \$8 per share (Tr. 1799-1803).

David Kauffman and Matthew Peterson testified that they purchased Elinvest from Baron & Co. after being told by Robin Baron that the price of Elinvest was going to rise rapidly. They too never received their stock certificates. (Tr. 1690-99, 2043-49).

From this proof the jury was entitled to find that Baron's and Horvat's fraudulent representations that the price of Elinvest was going to rise rapidly were based on their knowledge that others were manipulating the price upwards. There can be no other explanation for their certainty that the price of Elinvest was going to rise. This is clearly confirmed by their statements to Separ that they had inside information on Elinvest and that he shouldn't re-sell Elinvest because that would depress the market in the stock. Moreover, Baron's and Horvat's failure to supply their customers with their stock certificates, indicative of the fact that Baron & Co. was simply another "boiler room" operation on Elinvest, demonstrated the extent to which they had gone in furtherance of their part in the conspiracy to make certain that the price of Elinvest was not depressed. For if their customers had gotten the certificates they might have resold the stock in the public market, thereby upsetting the plan to push the price of the stock up. Further, that Horvat believed that the sale of Separ's stock, only two-hundred shares, could affect the selling price of the stock established his knowledge of Van Aken's repeated representation to his co-conspirators that there were relatively few shares of Elinvest in the market.

Horvat's insistence that there was no direct proof of his being told of terms of the conspiracy ignores Baron's involvement and his joint action with Baron and the substantial proof of Baron's participation in the conspiracy.

Moreover, Horvat's SEC testimony on May 3, 1972, in which he denied ever hearing of George Van Aken until after he left his employment with Baron & Co., which directly contradicted his grand jury testimony given on May 2, 1973 that Baron told him, prior to the time any Elinvest stock was sold, that George Van Aken controlled

Elinvest, belies his claim of innocent intent. This, along with his outright denial in the grand jury that he made price projections on Elinvest stock, entitled the jury to find that he was attempting to conceal his involvement in the conspiracy by making false exculpatory statements. *United States v. McConney*, 329 F.2d 467, 470 (2d Cir. 1964).

Finally, Horvat's claim that the Government failed to prove that he did not believe his representations of a rapid rise in price misses the point of the manipulation. That Horvat believed that the price of Elinvest would rise rapidly established his participation in the conspiracy. The jury was entitled to find that he made these price projections only because he knew the stock was being manipulated and that without this knowledge he would not have been in a position to represent as an absolute certainty, as he and Baron did, that the price of the stock would increase rapidly. Horvat's inconsistent projections—he told Nash that the price would go to \$6 or \$8 one day before he told Separ it would go to \$10 or \$12 per share—confirms this and permitted the jury to find that his motivation was to foist this stock upon unsuspecting purchasers as quickly as possible while concealing from them that he was receiving personally \$.50 per share for each share he sold, and that the stock they were purchasing was being manipulated.

B. Stock Fraud Counts

The substantial evidence establishing the sufficiency of the proof on the conspiracy count is dispositive of most the contentions of appellants Horvat, Orpheus and Drew on the substantive counts.

Horvat's argument that the Government failed to show that he did not have a reasonable basis for the price projections he made ignores the record. Horvat told Thomas

Nash on June 10, 1971, that Elinvest would go to \$6 or \$8 per share. One day later he told Michael Separ that it would go to \$10 or \$12 per share. After these individuals purchased the stock, Horvat failed to supply them with the stock certificates they purchased. (Tr. 1765-71, 1799-1803) This proof permitted the jury to find that Horvat's price projections were based on nothing more than his belief that Elinvest was being successfully manipulated in the market place, a belief he concealed from his customers,* as well as the fact that he was receiving \$.50 per share for each share of Elinvest stock he sold, which amounted to 12.5% of the price being charged per share, and that he was almost exclusively engaged in selling Elinvest stock. Horvat's false grand jury testimony that he never made price projections further belies his claim that he had a reasonable basis for the price projections. The jury was entitled to find that if he did have a reasonable basis for these projections, he would have told the grand jury that basis rather than denying that he made the projections at all, and that the true reason for the projections was his belief that Elinvest was being manipulated.

Consequently, the evidence against Horvat on Counts Nine, Ten and Thirteen, relating to specific sales of Elinvest shares he personally made, was sufficient. As to the remaining stock fraud counts, the jury properly found Horvat guilty under the trial court's aiding and abetting charge.** Horvat's participation in the scheme to manip-

* The SEC has held that "predictions of specific and substantial increases in the price of a speculative security, within a relatively short period of time are inherently fraudulent and cannot be justified whether couched in terms of opinion or fact". *In the Matter of James De Mamos, et al.*, Securities Exchange Act Release No. 8090, p. 3 (June 2, 1967); see also *R. Baruch & Co.*, Securities Exchange Act Release No. 7932, p. 7 (August 9, 1966).

** Horvat does not contend that the offenses listed in these counts were not committed. H's position is that he was not sufficiently linked to them by the evidence.

ulate and defraud antedated each of the specific fraudulent sales to which these counts relate. The proof established that Horvat was aware of the fact that others were manipulating Elinvest stock in the market place, and that necessarily there were other individuals or locations from which Elinvest was being fraudulently sold apart from Baron & Co. The jury was entitled to find that these other fraudulent sales succeeded in part on account of Horvat's successful efforts to place the stock in Duke's name in the hands of private customers on a long-term basis. For, if Horvat had not performed his part in the manipulation, a large block of the stock might well have ended up in the market place, which would have negated the efforts of his co-schemers to unload the stock for which they were responsible and to manipulate the price of the stock. Consequently, the success of each part of the sales operation, which involved Baron & Co. and Horvat, the boiler room operation at Van Aker's apartment, and Rosenthal's and Van Aker's sales, to which these other stock fraud counts relate, was dependent upon the efforts of the others.

Therefore, Horvat's successful efforts fraudulently to unload stock in a manner calculated not to affect the price of that stock adverse to the goals of the scheme in the Summer of 1971 facilitated and promoted the fraudulent sales made by his co-conspirators and their manipulatory activities. In turn, their fraudulent sales and manipulatory activities aided and facilitated Horvat's efforts to make certain the price of Elinvest would not be depressed by Horvat's customers selling the stock they had purchased. This being the case, the jury was entitled to find that Horvat not only had an interest in the efforts of those others who were fraudulently selling stock, but that his own actions were designed to aid and abet their illegal activities and that the criminal success of Horvat's actions was dependent on the success of the others. *Nye & Nissen*

v. *United States*, 336 U.S. 613, 619 (1949); *United States v. Peoni*, 100 F.2d 401, 402 (2d Cir. 1938). See *United States v. Scandifia*, 390 F.2d 244, 249 (2d Cir. 1968), *vacated on other grounds*, 394 U.S. 310 (1969).

Regarding Orpheus and Drew, the Government concedes that the evidence was insufficient to sustain their convictions in Counts Seven through Twelve. With respect to Count Thirteen, however, the evidence was sufficient to support their convictions under the court's aiding and abetting charge.*

Count Thirteen related to the fraudulent sale made by Horvat to Denny on July 8, 1971, a time at which Drew and Orpheus were deeply involved in the efforts to make the manipulation succeed. Just as Horvat's efforts promoted and facilitated their efforts to unload stock from Van Aken's apartment, their activities in furtherance of the manipulation at this time permitted Horvat to continue his fraudulent activity, part of which being the sale to Denny.

That Drew and Orpheus did not know Horvat is immaterial. There is no requirement that an aider and abettor know or communicate with his principal. *United States v. Bradley*, 421 F.2d 924, 927 (6th Cir. 1970); *White v. United States*, 366 F.2d 474, 476 (10th Cir. 1966). All that need be shown was that their actions were intended to and did in fact assist Horvat's fraudulent activities.

* As with Horvat, neither Orpheus nor Drew contends that the proof failed to show that the crimes to which this Count relates were committed.

C. Mail Fraud Counts

Horvat's convictions on these charges, Counts Fourteen through Eighteen, was premised on the identical aiding and abetting theory which established his guilt on the stock fraud counts as his own activities were designed to and did facilitate the commission of these crimes. Moreover, the mailings pertaining to these counts were also listed as overt acts in the conspiracy count. The proof showed that these mailings were made in furtherance of the conspiracy of which Horvat and Orpheus were convicted. If mailings are both the subjects of overt acts of a conspiracy and of substantive counts, and if they were in furtherance of the conspiracy, the members of that conspiracy are guilty of the substantive counts by reason of the fraudulent scheme in which they knowingly participated. *United States v. Kaufman*, 429 F.2d 240, 244-245 (2d Cir.), *cert. denied*, 400 U.S. 925 (1970).

The Government concedes that the proof was insufficient to sustain Orpheus convictions on Counts Fourteen through Seventeen. Regarding Count Eighteen, however, his guilt was directly established. This count concerned the sale of Elinvest to Lenore Braunfeld. The proof showed this sale was made from Van Aken's apartment by Gerstenzang, and that Orpheus himself telephoned McLeod to alert him to contact Braunfeld and confirm the sale made to her.

POINT II

Blitz's joinder in the indictment and the trial court's refusal to grant him a severance was proper.

Blitz does not contend that the evidence was insufficient to sustain his conviction, under the trial court's charge, on Count Nineteen. He does, however, contend that he was improperly joined in the conspiracy count of the indictment under Rule 8(b) of the Federal Rules of Criminal Procedure and the trial court should have granted his motions for a severance prior to and during the trial.

Blitz's argument is premised on the fact that the Government was aware that George Van Aken had testified in a prior trial that, to Van Aken's knowledge, Blitz was not aware of any manipulations in which Van Aken was involved. Based on this, Blitz asserts that the Government did not have a reasonable expectation that it could prove Blitz's involvement in the conspiracy and, therefore, joined him in bad faith for the purpose of prejudicing him. *Stern v. United States*, 409 F.2d 819, 820 (2d Cir. 1969); *United States v. Branker*, 395 F.2d 881, 887 (2d Cir. 1968); *United States v. Aiken*, 373 F.2d 294, 299 (2d Cir.), *cert. denied*, 389 U.S. 833 (1967). This argument ignores both the facts and the law.

The conspiracy count in this indictment charged as its objective the commission of three separate and distinct crimes, only one of which was the use of manipulative practices in connection with the purchase and sale of Elinvest stock in violation of Title 15, United States Code, Section 78j(b). The conspiracy count also charged the defendants with agreeing to commit mail fraud in violation of Title 18, United States Code, Section 1341 and agreeing to use devices and schemes to defraud and engaging in transactions, practices and courses of business

which would operate as a fraud and deceit upon the purchasers of Elinvest stock in violation of Title 15, United States Code, Sections 77q(a) and 77x.

Even assuming that Blitz had no knowledge of Van Aken's manipulative practices with respect to Elinvest, that is, Van Aken's actions designed to maintain the price of the stock, the proof establishing his acceptance of a bribe from Van Aken and Bradley to purchase Elinvest for the Astron Fund, which he concealed from the 3000 shareholders of the fund and his superiors, was certainly sufficient to give the Government a reasonable expectation that Blitz could be convicted of conspiracy with Van Aken and Bradley to sell stock by means of fraud. (Tr. 342-344.) Further, that Santini, who was the supervisor of the "boiler room" operation at Van Aken's apartment, told Willeford, when attempting fraudulently to sell him Elinvest stock, that he could call Blitz as a reference for the company, buttressed this position. (Tr. 1940-42) A fair inference from this proof was that if Willeford had called Blitz, he would have received the same story he was getting from Santini, which was fraudulent. The Government was not required to prove Blitz's participation in each objective of the conspiracy; one is sufficient. *United States v. Kaufman, supra*, 429 F.2d at 243; Cf. *United States v. Cohen*, Dkt. No. 74-2026 (2d Cir. June 26, 1975), slip op. at 4419-20.*

Moreover, it has continuously been the Government's position that the proof at trial was sufficient to sustain a conviction of Blitz for the entire conspiracy charged. Blitz's actions in taking a bribe to buy Elinvest for the

* It was specifically on this basis that the trial court denied Blitz's pre-trial motion for severance. *Defendant Blitz's Appendix* at 50-54.

fund were simply a part of a series of transactions, engaged in by many of the co-conspirators, designed to foist this same stock fraudulently upon unsuspecting purchasers. The acceptance of this bribe by Blitz necessarily gave him notice, notwithstanding Van Aken's opinion to the contrary, that Van Aken was in the process of rigging the price of Elinvest. If the selling price of Elinvest at which Blitz purchased the stock were legitimate, Van Aken would have had no reason to pay Blitz a \$25,000 bribe to buy it. Blitz, as the portfolio manager of a mutual fund with several years of experience—experience which included repeated acceptance of bribes by Blitz to acquire shares in “speculative” companies for the Astron Fund—could not close his eyes to this inference which necessarily flowed from this fraudulent transaction. *Compare United States v. Jacobs*, 475 F.2d 270, 287 (2d Cir.), *cert. denied sub nom. Thaler v. United States*, 414 U.S. 821 (1973). Judge Bonsal found, however, that although the proof showed that Blitz and Van Aken may have been in a conspiracy to sell stock fraudulently to the fund, it was insufficient to link Blitz to the conspiracy charged.* He therefore dismissed the conspiracy count against Blitz at the close of all the evidence.**

* Judge Bonsal stated:

“I have been thinking about this quite a bit, and I mentioned something about it yesterday, and I don't believe the evidence establishes that Blitz was in this particular conspiracy. I think he certainly might have been in a conspiracy with Van Aken to stash away stock for the Astron Fund.

“I am concerned about that and I am going to grant the motion to dismiss as to the conspiracy.” (Tr. 3304.)

** At the close of the Government's case, Judge Bonsal felt that there was sufficient evidence linking Blitz to the conspiracy charge and denied his motion to dismiss it at that time. (Tr. 2209-21.)

The fact that the conspiracy count against Blitz was dismissed at the close of the evidence does in no way, however, support Blitz's contention that the Government joined him in the conspiracy in bad faith for the purpose of prejudicing him. Indeed, Judge Bonsal found, in denying Blitz's post-trial motion for a new trial on this very issue, that he could "see why [the Government] pressed the charges [against Blitz] on the conspiracy and substantive counts."*

Moreover, even assuming that Blitz had not been charged in the conspiracy count, his joinder in the indictment would still have been proper under Rule 8(b) of the Federal Rules of Criminal Procedure. Counts Seven through Thirteen charged the defendants with a scheme to defraud in connection with the purchase and sale of Elinvest stock in violation of Title 15, United States Code, Section 78j(b). Count Eight was directed specifically to Blitz's corrupted purchase of 25,000 shares for the Astron Fund on June 9, 1971 through the defendant Rosan's brokerage firm. Counts Fourteen through Eighteen charged the defendants jointly with mail fraud in connection with Elinvest purchase and sale transactions in violation of Title 18, United States Code, Section 1341. Count Fifteen was directed specifically to the Astron Fund purchase of 25,000 shares on June 9, 1971. These groups of counts, all dealing with offenses arising out of the Elinvest manipulation, were part of the "same series of acts or transactions constituting the offense or offenses". *Fed. R. Crim. P.* 8(b); cf. *United States v. Granello*, 365 F.2d 990, 993-995 (2d Cir. 1966), *cert. denied*, 368 U.S. 1019 (1967); *Application of Gottesman*, 332 F.2d 975 (2d Cir.

* *Blitz' Appendix* at 94-102; *Transcript of Blitz Sentencing* at page 5. This page and the remaining five pages of the transcript of this proceeding were omitted from *Blitz' Appendix*.

1964); *United States v. Mack*, 466 F.2d 333, 337 (D.C. Cir.), *cert. denied*, 409 U.S. 952 (1972). Consequently, the trial court did not abuse its wide discretion in refusing to grant Blitz a severance. *United States v. Projan-sky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972); *United States v. Miley*, 513 F.2d 1191, 1209 (2d Cir. 1975).

Even assuming, *arguendo*, that there was misjoinder under Rule 8(b), Blitz is still not entitled to a reversal because of his failure to show that he was prejudiced by the joint trial notwithstanding his conclusory statements to the contrary.* *Berger v. United States*, 295 U.S. 78, 82 (1935); *United States v. Miley*, *supra*, 513 F.2d at 1209-1210; *United States v. Vega*, 458 F.2d 1234, 1236 (2d Cir. 1972), *cert. denied sub nom.*, *Moore v. United States*, 410 U.S. 982 (1973); *United States v. Weiss*, 491 F.2d 460 (2d Cir.), *cert. denied*, 419 U.S. 833 (1974); *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970); *Oppen v. United States*, 348 U.S. 84, 85 (1954); *United States v. Elgisser*, 334 F.2d 103 (2d Cir.), *cert. denied sub nom. Gladstein v. United States*, 379 U.S. 879 (1964); *Fed. R. Crim. P.* 52(a); 8A *Moore's Federal Practice* Par. 52.03[2], at 52-12 (1975). An examination of the record discloses no prejudice whatsoever. Indeed, the jury's acquittal of Blitz on all counts except Count Nineteen demonstrates that Blitz suffered no prejudice. *United States v. Papadakis*, 510 F.2d 287, 300-301 (2d Cir. 1975); *United States v. Jordan*, 399 F.2d

* Whether the argument is misjoinder under Rule 8 of the *Fed. R. Crim. P.* or failure to grant a severance under Rule 14 of the Rules, the test is whether prejudice resulted from the joint trial. *Schaffer v. United States*, 363 U.S. 511, 513 (1960); *United States v. Miley*, 513 F.2d 1191, 1207 (2d Cir. 1975); *United States v. Granello*, 365 F.2d 990, 995 (2d Cir. 1966), *cert. denied*, 368 U.S. 1019 (1967).

610, 615 (2d Cir.), *cert. denied*, 393 U.S. 1005 (1968); *Barnes v. United States*, 381 F.2d 263, 264 (D.C. Cir. 1967); *Maurer v. United States*, 222 F.2d 414, 415 (D.C. Cir. 1955). This Court has recently sustained convictions, because of a failure to show prejudice, in a multiple conspiracy case in which the defendants, unlike Blitz, were found guilty of all counts tried. *United States v. Miley*, *supra*, at 1200. Further, Blitz's attempt to show prejudice by references in the record to violent activities on the part of co-conspirators whom he did not even know is defeated by the jury's acquittal of Rosan on all counts notwithstanding the fact that Rosan had a connection, albeit remote, to one of these co-conspirators. Drew, against whom some of this testimony was elicited, was himself found not guilty on several counts. These verdicts show that the jury meticulously complied with Judge Bonsal's instructions, which Blitz did not challenge, that they should consider each defendant's participation, if any, separately (Tr. 3726).^{*} *United States v. Papadakis*, *supra*, at 300-301.

Blitz points to two areas in which he claims prejudice by the joint trial but does not articulate in what way this prejudice occurred. His argument amounts at most to a contention that he stood a better chance of acquittal on all counts if tried alone, a claim which has been specifically rejected as a standard of prejudice. *United States v. Fantuzzi*, 463 F.2d 693, 687 (2d Cir. 1972); *United States v. Borelli*, 435 F.2d 500, 502 (2d Cir. 1970), *cert. denied*, 401 U.S. 946 (1971).

^{*} In his brief Blitz repeatedly states that the only issue which the jury was called upon to decide with respect to his case was whether he was telling the truth or Van Aken was telling the truth. This contention totally ignores the fact that, in addition to Van Aken, witnesses Rosenthal, Bradley, Palmer, Russell and Hellar furnished testimony strongly implicating Blitz in his acceptance of a bribe from Van Aken.

First, the fact that several witnesses identified a police photograph of the severed defendant Robert Turco, a/k/a "Frank Bruno" (GX 79) was proper and specifically permitted by the trial court. (Tr. 1222, 2640) Van Aken testified that he was threatened by a person whom he knew as "Frank Bruno" in connection with Elinvest and identified GX 79 as a picture of Bruno. (Tr. 476) Barry Ross identified this exhibit as a picture of Robert Turco. (Tr. 1229, 1229a) Subsequently, Orpheus identified this exhibit as a picture of a man he knew as Frank Bruno. (Tr. 2624) Without the use of this exhibit it would have been next to impossible to establish with certainty that Turco and "Bruno" were the same man. The picture of John Santiago, a/k/a "Sonny Santini"* was not a "mug shot", and Judge Bonsal found that neither picture was displayed to the jury notwithstanding Blitz's speculation to the contrary (Tr. 1221-22; GX 80)

Second, relying on *United States v. Torres*, 503 F.2d 1120 (2d Cir. 1974) and *United States v. Alu*, 246 F.2d 29 (2d Cir. 1957), Blitz implies that the Government acted improperly in calling to the witness stand Edward Levitt, a trial attorney with the Department of Justice, who had been simply sitting at Government counsel table for approximately the first half of the trial. This argument is meritless.

During cross-examination of Government witnesses Gerstenzang and Pollisky, counsel for Drew sought to impeach their direct testimony that Drew had threatened them when they refused to buy or sell Elinvest stock. He attempted to do this by questioning these witnesses with

* Blitz claims that he did not know Santini. Santini, however, certainly knew of him as he gave Blitz's name and phone number to Willeford as a reference Willeford could call on Elinvest to confirm what Santini was telling him. (Tr. 1930-42, 2450; GX 59E.)

respect to pre-trial interviews they had with Levitt during which Levitt took notes. These notes, which were furnished to defense counsel as 3500 material, did not contain a reference to threats by Drew. (Tr. 1663-65, 1857-61; GX 3538, 3545) Counsel for Drew showed these notes to Pollisky and Gerstenzang on cross-examination attempting to draw the inference that since the notes did not contain a reference to threats by Drew, the witnesses had fabricated their testimony sometime subsequent to these interviews. (Tr. 1663-65, 1857-61)

When the Government refused to stipulate that GX 3538 fully reflected the interview with Gerstenzang, counsel for Drew proposed to the Court at a side bar conference that he would call Levitt to the witness stand to identify this exhibit. (Tr. 1665-66) Later, when Government counsel proposed at a side bar conference that the Government would call Levitt to the witness stand with respect to these notes, neither counsel for Drew nor any other counsel had any objection to Levitt's testimony. Indeed, when the Court stated that this would be a way to get the entire pre-trial conversation between Levitt and Pollisky, counsel for Drew said this was "very good." (Tr. 1869-70)

Levitt's testimony rebutted Drew's attack on Gerstenzang's and Pollisky's testimony. He testified that these witnesses did in fact make statements to him that they had been threatened by Drew. (Tr. 1871-80) Only after Levitt's testimony was completed did Blitz object to this procedure although he and the other defendants knew full well of the Government's proposal in advance. (Tr. 1915-16) Blitz's motion for a mistrial was denied on the ground that the testimony came in on a very limited issue. (Tr. 1915)

Levitt's testimony was clearly admissible as showing prior consistent statements of Gerstenzang and Pollisky offered to rebut a claim of recent fabrication. *United States v. Zito*, 467 F.2d 1401, 1404 (2d Cir. 1972); see also Rule 801(d)(1), FEDERAL RULE OF EVIDENCE. Moreover, as the record reflects, if the Government had not called Levitt to the stand, counsel for Drew would have.*

In any event, shortly after Levitt's testimony he left the courtroom and did not return for the duration of the trial. (Tr. 1915-24) *United States v. Pepe*, 247 F.2d 838, 844 (2d Cir. 1957). He at no time during the trial questioned witnesses or participated in oral argument before the court in the presence of the jury. The trial court charged the jury on Levitt's appearance as a witness (Tr. 3784-85), and no objection was taken to this portion of the charge. (Tr. 3790-3808)

POINT III

The trial court's refusal to grant Horvat a severance was not error.

Horvat contends that the trial court's failure to grant him a severance was reversible error. His argument is frivolous.

The grant or denial of a motion for severance under Rule 14 of the Federal Rules of Criminal Procedure is with the sound discretion of the trial court, *Oppen v. United States*, *supra*, at 95; *United States v. Projansky*, 465 F.2d 123, 138 (2d Cir.), *cert. denied*, 409 U.S. 1006

* It is significant to note that Drew does not raise this point on appeal even though the issue at the trial related specifically to him.

(1972), and the denial of a motion for severance will be reversed only upon a clear showing that there has been an abuse of that discretion. *United States v. Jenkins*, 496 F.2d 57, 67-68 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). An abuse of discretion may only be found if the joint trial was "manifestly prejudicial", *United States v. Berlin*, 472 F.2d 13, 15 (9th Cir. 1973), or if the trial resulted in substantial prejudice to the defendant, *United States v. Miley*, *supra*, at 1209-10. Horvat has made no such showing here. See, *e.g.*, *United States v. Cohen*, Dkt. No. 74-2026 (2d Cir., June 26, 1975), slip op. at 4422; *United States v. Koss*, 506 F.2d 1103, 1114 (2d Cir. 1974). His conclusory statements of prejudice based on references to the proof against his co-defendants are belied by the jury's acquittal of Rosan on all counts, Blitz on most counts, and Drew, to whom some of this proof directly related, on several counts. As the jury obviously was not swayed by this "prejudicial" proof as to these defendants, it certainly did not single out Horvat for this purpose. *United States v. Papadakis*, *supra*, at 300-301; *United States v. Jordan*, *supra*, at 615.

Horvat's reliance on *United States v. Kelly*, 349 F.2d 720 (2d Cir. 1965) is misplaced. *Kelly* involved a nine-month trial involving 18,000 pages of transcript, over 1,500 exhibits, an indictment naming twenty defendants and twenty-eight additional co-conspirators and charging 160 counts in which this Court reserved the conviction of the defendant Shuck because of a variety of factors, none of which is present here. First, the proof against Shuck was insubstantial on the conspiracy charged, although it may have linked him to a separate conspiracy from the one charged; second, the trial court failed to charge the jury as to multiple conspiracies; and third, the trial court permitted the reading into the record of post-conspiracy testimony of one of Shuck's co-defendants, which impli-

cated Shuck, a procedure which today would be in violation of *Bruton v. United States*, 391 U.S. 123 (1968). Because of these factors, in addition to Shuck's illness, which required an adjournment and may have prejudiced the jury against him, the Court believed he was denied a fair trial and reversed his conviction. *United States v. Kelly, supra*, at 756-758.

The trial court here did charge the jury on separate conspiracies (Tr. 3757), and Horvat made no objection. His conviction on the conspiracy count is dispositive of his contention that he was not a member of the conspiracy charged.

POINT IV

The grand jury procedure was proper.

A. Blitz

Blitz raises several objections without supporting authority with respect to the grand jury procedure leading up to the indictment. They are meritless.

On August 9, 1974, Indictment 74 Cr. 798 was returned by a grand jury that had been empanelled in this District on August 22, 1972. The indictment was returned after the term of that grand jury had been extended beyond eighteen months. On December 31, 1974, another grand jury returned the superseding indictment (S.74 Cr. 1226) upon which Blitz and his co-defendants were convicted. Government attorneys read to the grand jury which returned the superseding indictment testimony taken in the earlier grand jury proceeding. The grand jury which returned the superseding indictment also heard the live testimony of witnesses in connection with the Elinvest stock fraud.* Most of the

* Affidavit of Assistant United States Attorney Dominic F. Amorosa, printed in *Blitz Appendix* at 129-131.

testimony which was taken before the August 22, 1972 grand jury, and which was read to the grand jury that returned the superseding indictment, was given before the first grand jury's tenure had been extended.

Blitz argues that the term of the grand jury had been extended illegally under *United States v. Fein*, 504 F.2d 1170 (2d Cir. 1974). While not contending that the subsequent grand jury which returned the superseding indictment was subject to attack under *Fein*, Blitz claims that testimony taken before the first grand jury after its extension, which was read to the second grand jury, "tainted" the superseding indictment. Even if the extension of the first grand jury was void under *Fein*, which we by no means concede, Blitz' argument is frivolous. First, "[a]n indictment valid on its face is not subject to challenge on the ground that the grand jury acted on the basis of inadequate or incompetent evidence. . . ." *United States v. Calandra*, 414 U.S. 338, 345 (1974); *United States v. James*, 493 F.2d 323, 326 (2d Cir.), cert. denied, 419 U.S. 849 (1974). Second, if the first grand jury was extended illegally under *Fein*, the most that can be said of the testimony given after the extension is that even though each witness took the oath, the testimony was unsworn as a matter of law because the foreman, being *functus officio*, lacked the power to administer a valid oath. However, the absence of a valid oath would have at worst made this testimony in one respect hearsay, hardly a ground to make it inadmissible before the second grand jury which returned the superseding indictment on which Blitz was convicted. *Costello v. United States*, 350 U.S. 359, 361-363 (1956). Indeed, testimony which is "unsworn" by reason of an extension, not then known to be invalid, of the term of the grand jury before which it is taken is nevertheless exceedingly reliable, given the belief by all concerned, including the witness, that the

grand jury is entitled to sit and that the testimony is in fact given under oath and subject to the penalties of perjury.

Blitz' request for a hearing to determine whether there was sufficient evidence placed before the second grand jury to support his indictment is frivolous. *United States v. Calandra, supra*, at 345. The testimony taken before the first grand jury which supported his indictment was read to the superseding grand jury.*

Further, that Blitz' own grand jury testimony ** was not read to the grand jury which returned the superseding indictment presents no error. *Cf. United States ex rel. McCann v. Thompson*, 144 F.2d 604 (2d Cir.), *cert. denied*, 323 U.S. 790 (1944).

In any event, these issues were raised for the first time during the trial and were consequently waived. Rule 12(b)(2) of the Federal Rules of Criminal Procedure. *United States v. Galgano*, 281 F.2d 908, 911 (2d Cir.), *cert. denied*, 366 U.S. 960 (1960); *Throgmartin v. United States*, 424 F.2d 630, 631 (5th Cir. 1970).

B. Horvat

Horvat contends that he was effectively denied his constitutional right of indictment by a grand jury because of Edward Levitt's appearance before the grand jury both

* *Blitz Appendix* at 129-131.

** Blitz testified before a grand jury in the Southern District of New York on July 27, 1973. This testimony was not given before either the grand jury which returned the first indictment or the grand jury which returned the superseding indictment. Blitz was called before the grand jury which returned the first indictment on March 28, 1973 and invoked his Fifth Amendment right against self-incrimination. Blitz' appearance on July 27, 1973, was in connection with an unrelated grand jury investigation. He did, however, testify about certain aspects of his dealing in Elinvest stock.

as a witness and Government attorney. As Horvat neither raised this point prior to or during the trial, it is waived. Fed. R. Crim. P. 12(b)(2); *United States v. Galgano*, *supra*, at 911; *United States v. Throgmartin*, *supra*, at 631. Indeed, by Horvat's failure to raise this issue at or prior to trial, the Government was not afforded an opportunity to make a proper record on this point. *United States v. Marin*, 513 F.2d 974, 976 (2d Cir. 1975). The Government will nevertheless deal with the merit of this contention.

A Government prosecutor is not prohibited from presenting evidence to a grand jury. *Branzburg v. Hayes*, 408 U.S. 665, 701 (1972). Indeed, "[t]he grand jury's sources of information are widely drawn and the validity of an indictment is not affected by the character of the evidence presented." *United States v. Calandra*, 414 U.S. 338, 344-45 (1974).

Horvat's reliance on *Robinson v. United States*, 32 F.2d 505 (8th Cir. 1928), *United States v. Spangalet*, 258 F.2d 338 (2d Cir. 1958), *United States v. Pepe*, 247 F.2d 839 (2d Cir. 1957), and *United States v. Alu*, 246 F.2d 29 (2d Cir. 1957), is misplaced. These authorities concern the propriety of a Government attorney placing his credibility in issue at a trial by appearing as a witness at a trial in which he is also the prosecutor. There is no allegation here that any of the matters Horvat complains of were presented to the trial jury. Specifically, Horvat's reference to the grand jury transcript, which reflects several questions asked him by Levitt, ignores the fact that this portion of his grand jury testimony was not placed before the trial jury.

Furthermore, Levitt's credibility was not placed in issue in the grand jury proceedings. The indictment on which Horvat was tried was a superseding indictment returned by a grand jury which did not hear the original

witnesses. Levitt's sole function before this grand jury was, as a sworn witness, to identify and read aloud the testimony given before the original grand jury. Indeed, a person other than Levitt read Horvat's testimony. Levitt did not **appear as a prosecutor** before this grand jury. Moreover, Levitt's testimony before the original grand jury was merely in the nature of laying a foundation for the introduction to the grand jury of documents obtained by the SEC in the course of its investigation* and, at times, reading those documents aloud to the grand jury.** Such perfunctory testimony did not put his credibility in issue and cannot, therefore, be said to have prejudiced Horvat.

POINT V

It was not error for the trial court to refuse to charge the jury consistent with Drew's request No. 14.

Drew claims, without supporting authority, that the trial court should have charged the jury that Orpheus' prior grand jury testimony that Drew received money from Santini in connection with Elinvest should have been considered by them only for the purpose of impeaching Orpheus' trial testimony, and showing Orpheus' knowledge, and not as substantive proof against Drew. This contention lacks merit.

* During the SEC investigation, Mr. Levitt had been an attorney with the Commission and was in charge of the investigation. Thereafter, he was also commissioned as a Special Attorney assigned to the Strike Force.

** The Government, having been precluded from making a complete record at trial, will submit all or any portion of the testimony given by Levitt before the grand juries which the Court wishes to review.

First, Drew has erroneously assumed that Orpheus' grand jury testimony in this context was hearsay. As Orpheus adopted this testimony on cross-examination and indicated in substance that he believed it was true, it could no longer be characterized as hearsay. Drew Appendix at 6A-7A; *Federal Rules of Evidence* 801(d)(1), *Advisory Committee's Note*; *United States v. Borelli*, 336 F.2d 376, 390-391 (2d Cir. 1964), *cert. denied*, 379 U.S. 960 (1965); *Stewart v. Baltimore & Ohio R.R.*, 137 F.2d 527, 529 (2d Cir. 1943). *See also*, *United States v. Nuccio*, 373 F.2d 168, 172 (2d Cir.), *cert. denied*, 387 U.S. 906 (1967); *United States v. Ellis*, 461 F.2d 962, 969 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972).

Second, even if Orpheus had denied the truth of his prior grand jury testimony, it would still have been admissible as substantive proof against Drew. *United States v. De Sisto*, 329 F.2d 929, 932-34 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964); *United States v. Nuccio*, *supra*, at 172. Moreover, Rule 801(d)(1)(A) would permit the prior testimony to be used as substantive proof as long as the declarant is subject to cross-examination, a right which Drew declined to exercise here (T. 2546-2655).

Drew's attempt, without supporting authority, to argue that these authorities should not apply to the situation in which the prior testimony of a defendant inculcates a co-defendant is totally inconsistent with *United States v. Gonzalez-Carta*, 419 F.2d 548, 552 (2d Cir. 1969), which held that prior inconsistent grand jury testimony of a co-defendant Government witness, which exculpated a defendant on trial, should have been considered as substantive proof of that defendant's innocence. If prior testimony of a witness exculpating the defendant is admissible as to defendant's innocence, prior testimony inculcating a defendant should be admissible to show his guilt. Further, he offers no reason for distinguishing the testimony of an ordinary witness from the testimony of a co-defendant witness, nor does common sense suggest one.

POINT VI

The court's failure to charge that making a market is a legitimate function was not reversible error.

Orpheus claims, without supporting authority, that the trial court should have charged the jury that a "market maker" performs a legitimate function with respect to the sale of securities and that the failure so to charge is reversible error. This argument is without merit.

The term "market maker" was defined and described by several witnesses (Tr. 816, 1207-8), and at no point did any party or witness contend that a "market maker" did not perform a legitimate function in the sale of securities. There is absolutely nothing in the record to indicate that the trial Court abused its discretion in refusing to give the requested charge, since the propriety of a market maker's function was never an issue in the case. *United States v. Dana*, 457 F.2d 205 (7th Cir. 1972). Moreover, as the request for this instruction was not made in writing, but was made orally after the Court completed its initial charge, it could have been denied on that ground alone (Tr. 3807). *United States v. Gonzalez-Carta*, *supra* at 552.

POINT VII

The trial court's charge on Count Nineteen was consistent with the law.

Count Nineteen charged Blitz with accepting outside compensation in the amount of \$25,000 for the purchase of Elinvest for the Astron Fund in violation of Title 15, United States Code, Section 80a-17(e) (1).

Judge Bonsal charged the jury on this count that they could find Blitz guilty if they believed that he accepted any benefit or value in connection with his decision to purchase Elinvest on behalf of the Astron Fund regardless of whether the benefit or value was labeled as a gift, payoff or loan (Tr. 3776-77).

Blitz now asserts that this charge was erroneous. His argument is frivolous.

Blitz does not dispute, as he cannot, that the term "compensation" within the statute means "any benefit or thing of value." *United States v. Deutsch*, 451 F.2d 98, 114-115 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972). Nor does he contest that the objective of this statute is to prevent individuals in his position from having their judgment and fidelity impaired by conflicts of interest. *United States v. Deutsch, supra*, at 109. His position reduces itself to the claim that as the Court charged the jury that they could find that a loan, as well as a payoff, was a thing of value or compensation, he is entitled to reversal because a loan, as a matter of law, cannot be compensation or value, an argument identical to one specifically rejected by this Court in interpreting

Section 302 of the Labor Management Relations Act.* *United States v. Roth*, 333 F.2d 450, 453 (2d Cir.), cert. denied, 380 U.S. 942 (1965).

The Government's proof established that Blitz accepted a \$25,000 bribe from Van Aken and Bradley to buy Bradley's Elinvest stock for the Astron Fund, of which Blitz was the portfolio manager. Subsequently, when Van Aken learned that the SEC was investigating Elinvest, he contacted Blitz and told him that to protect them both, Blitz should return the money so that they could label it a loan. Although Blitz told Rosenthal that Van Aken's proposal was unfair, he ultimately returned the money.**

Blitz testified that he accepted a \$25,000 unsecured loan from Bradley after he purchased the stock for the Fund and that the loan had nothing to do with his decision to purchase the stock. The Court's charge made it a prerequisite to a finding of guilt that the jury first find that Blitz accepted a benefit or thing of value in connection with his decision to buy the stock for the fund.***

* Title 29, United States Code, Section 186(a). At the time of the offense in *Roth*, this section prohibited any employer from paying or delivering "any money or other thing of value" to a representative of his employees.

** Although not contesting sufficiency of proof, Blitz implicitly asserts that because the payment was in the form of a check, the parties could not have viewed it as improper. This position ignores that fact that it would have cast suspicion on Blitz if he deposited \$25,000 in cash in his bank account.

*** Reasoning from *United States v. Deutsch*, *supra*, at 109, it appears that one can be convicted under Section 17(e)(1) if one receives compensation even if one does nothing in return for it. "Given the nature of the investment company industry, it would be extremely difficult to prove that the payment of compensation actually caused a particular purchase. It is most unlikely that Congress intended a construction which would rob Section 17(e)(1) of its effectiveness." Consequently, Blitz was convicted of a Section 17(e)(1) violation under a higher standard of proof than the law required. *United States v. Deutsch*, *supra*, at 109-113.

Without finding this nexus the jury was not able to find Blitz guilty. Consequently, the jury's verdict necessarily rejected Blitz's testimony that the money he took had no connection with his decision to purchase the stock.

To hold that a benefit or thing of value within the ambit of Section 17(e) (1) does not as a matter of law include "loans" would not only be violative of common sense and inconsistent with *United States v. Roth, supra*, but would encourage individuals in a fiduciary position, such as Blitz, to disguise their conflicts of interest by accepting "loans" in return for particular purchases of securities.* Congress intended no such loophole in Section 17(e) (1). Cf. *United States v. Deutsch, supra*, at 109.

POINT VIII

The admission into evidence of Willeford's telephone conversation with a person who identified himself as Orpheus was proper.

Orpheus contends that Willeford's testimony of conversations he had about Elinvest stock with a person who identified himself as Orpheus was improperly admitted into evidence because there was no evidence that Willeford could recognize Orpheus' voice. This argument ignores the record. As part of its direct case, the Government introduced a portion of Orpheus' grand jury testimony in which he admitted talking on the telephone to Willeford. (Tr. 2079-81). Consequently, not only was there sub-

* Blitz' references to federal income tax cases excluding loans from gross income are inapposite as the question here is not what "income" is, but what a "benefit or a thing of value" is. Although a loan may not be income, it certainly is value to the recipient or he would not have requested it. *United States v. Roth, supra*, at 453.

stantial circumstantial evidence suggesting that Orpheus spoke to Willeford on the telephone, see *United States v. Zane*, 495 F.2d 683, 697-98 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974), *United States v. Fassoulis*, 445 F.2d 13, 17 (2d Cir.), *cert. denied*, 404 U.S. 858 (1971), but his direct admission established that he did so. Moreover, on cross-examination, Orpheus again admitted that he spoke with Willeford on the telephone with respect to Elinvest stock. (Tr. 2528-30).

CONCLUSION

The judgments of conviction as to appellants Horvat and Blitz should be affirmed. The judgment of conviction as to appellant Drew should be affirmed on Counts One and Thirteen, and reversed on Counts Seven through Twelve. The judgment of conviction as to appellant Orpheus should be affirmed on Counts One, Thirteen and Eighteen, and reversed on Counts Seven through Twelve and Fourteen through Seventeen.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK }
COUNTY OF NEW YORK }

Edward J. Levitt being duly sworn, deposes and says that he is employed in the office of the New York Joint Strike Force Against Organized Crime and Racketeering, Southern District of New York.

That on the 18th day of September, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

See attached sheet

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Edward C. Smith

Sworn to before me this

18th day of September, 1975

Jacob Zafir

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